

BEFORE THE  
FEDERAL MARITIME COMMISSION

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PETITION OF UNITED PARCEL SERVICE, INC.  
FMC Petition No. P3-03

PETITION OF C.H. ROBINSON WORLDWIDE, INC.  
FMC Petition No. P9-03

PETITION OF NATIONAL CUSTOMS BROKERS  
AND FORWARDERS ASSOCIATION OF  
AMERICA, INC.  
FMC Petition No. P5-03

PETITION OF DANZAS CORPORATION D/B/A/  
DANMAR LINES LTD., DANZAS AEI OCEAN  
SERVICES, AND DHL DANZAS AIR AND OCEAN  
FMC Petition No. P1-04

PETITION OF OCEAN WORLD LINES, INC.  
FMC Petition No. P7-03

PETITION OF BDP INTERNATIONAL, INC.  
FMC Petition No. P2-04

PETITION OF BAX GLOBAL INC.  
FMC Petition No. P8-03

PETITION OF FEDEX TRADE NETWORKS  
TRANSPORT & BROKERAGE, INC.  
FMC Petition No. P4-04

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RESPONSE OF EXEL TRANSPORTATION SERVICES, INC. TO JOINT  
SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED ADOPTION OF A  
CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION

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Date: October 5, 2004

Pursuant to the Order of the Federal Maritime Commission (“Commission”) served on September 2, 2004, Exel Transportation Services, Inc. (“Exel”) hereby submits its response to the Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication (“Joint Supplemental Comments”) filed in the above-referenced dockets on August 2, 2004 by the National Industrial Transportation League, United Parcel Service, Inc., BAX Global, Inc., FedEx Trade Networks Transport & Brokerage, Inc., Transportation Intermediaries Association, C.H. Robinson Worldwide, Inc., and BDP International, Inc. (hereinafter jointly referred to as the “Joint Commenters”). Exel has previously filed comments in a number of these proceedings on January 23, 2004.

The “Tariff Exemption Proposal” submitted by the Joint Commenters would establish a regulatory structure for “NVOCC Agreements” virtually identical to that which currently exists for service contracts of vessel operating common carriers (“VOCCs”). “NVOCC Agreements” would be defined in language identical to that used for the definition of “service contracts” in the Shipping Act of 1984; 46 App. U.S.C. §1702[19]. NVOCC Agreements would be required to have the same essential terms as are required for service contracts in Section 8(c)(2) of the Shipping Act; 46 App. U.S.C. §1707(c)(2)<sup>1</sup>; and the identical essential terms would be required to be published by NVOCCs in a tariff format. *Id.* at §1707(c)(3). Finally, the Tariff Exemption Proposal makes it explicit that the Commission would have the same power over NVOCC Agreements that it currently has over service contracts.

Exel fully supports the need for greater pricing flexibility for NVOCCs and has no problem with the concept of transportation agreements between NVOCCs and their customers. It also supports the need for expeditious action by the Commission in this area. However, because it does not believe there is a need for NVOCC pricing arrangements of any kind to be filed with the Commission, it respectfully urges the

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<sup>1</sup> There appears to be a single difference between the essential terms required of a service contract and the essential terms the Joint Commenters would require of an “NVOCC Agreement.” That is, NVOCC Agreements would be required to have liquidated damages provisions, whereas such provisions are optional in service contracts.

Commission to reject this proposal, which would, in fact, increase regulatory filing burdens on the NVOCC industry.

The Tariff Exemption Proposal of the Joint Commenters seeks to replace the requirement of filing rates in a tariff with new requirements for filing NVOCC Agreements with the Commission and filing synopses of those Agreements – specifically not including the rates --in NVOCC tariffs. This would plainly impose greater burdens on NVOCCs with no corresponding regulatory benefit. Since it is clear that shippers do not look at NVOCC tariffs to find out what the rates are, why would the shippers look at NVOCC tariffs to see synopses of “NVOCC Agreements” that contain no rates? It is, in addition, highly doubtful the Commission itself would - - or could - - review the likely tens of thousands of NVOCC Agreement filings that would be produced by the Joint Commenters’ proposal. Thus, instead of eliminating regulatory burdens, it appears the Joint Commenters’ proposal would increase regulatory burdens on NVOCCs and impose an additional burden on the Commission itself. The Joint Commenters have offered no justification for this double filing requirement and Exel believes no such justification exists.

In the first place, these proceedings have made it clear that tariff filing does not provide the FMC with effective oversight of anything other than the filing of rates themselves. Since, as Congress clearly recognized in OSRA, common carriage is no longer a basis of U.S. maritime regulatory policy, there is no longer a meaningful public interest in preventing discrimination among shippers. So that rationale for rate filing is no longer valid.

Further, NVOCCs do not have market power and are not immunized from the antitrust laws, as are VOCCs. Therefore, there is no need for the Commission to have volumes of pricing material from NVOCCs to perform economic monitoring functions to ensure NVOCCs are not distorting the ocean shipping market. The Commission does not currently use NVOCC tariffs to monitor competitive conditions in the ocean shipping industry or even the NVOCC portion of the industry. Thus, there shouldn’t be a need to

accumulate thousands of “NVOCC Agreements” in the Commission’s files for no apparent purpose.

In this regard, the filing of service contracts by VOCCs serves a far different and much more relevant function. Through the exercise of their market power, VOCCs can inflict competitive harm in the marketplace. Congress has instructed the Commission to act promptly when necessary to forestall such harm. Having VOCC agreements and service contracts readily and instantly available in its own files gives the Commission the necessary tools to perform this function. Thus, there is a legitimate regulatory need for the filing of VOCC service contracts with the Commission.

There is, however, no regulatory need for a similar filing of NVOCC pricing arrangements. In this regard, the Joint Commenters’ proposal is based on a false proposition; that is, that NVOCCs and VOCCs require parallel regulatory oversight. Since VOCCs are capable of market distorting anti-competitive behavior, there is a clear need for close ongoing regulatory supervision of their pricing behavior that does not exist for NVOCCs.

Moreover, as numerous NVOCC submissions in these proceedings have made clear, there is a real cost to tariff filing, both in terms of monetary expense and the expenditure of management time and effort. There is, therefore, an opportunity cost to NVOCC filing (whether of tariffs or “NVOCC Agreements”) that the Commission should recognize in considering this proposal as well as the other tariff exemption requests. Given the lack of commercial or regulatory utility of NVOCC rate or agreement filing, there are clearly more critical and important areas for NVOCCs to employ their money, time and energy.

A prime example of this is in the area of security. As the Commission and other government agencies; notably, U.S. Customs and Border Protection (“CBP”), recognize NVOCCs perform critical functions in the international supply chains in which they participate. Since 9/11, CBP has adopted new regulations permitting NVOCCs to file

their shipment information directly in the Vessel Automated Manifest System (“Vessel AMS”) so as to enable them to comply with the 24 Hour Advance Manifesting Rules. A significant number of NVOCCs, including Exel, have opted to do this by filing international carrier bonds with CBP and investing in the technology necessary to electronically file their manifests in Vessel AMS. CBP has made it clear that advance manifest filing is a critical component of its efforts to protect the United States from the introduction of weapons of mass destruction, other terrorist supplies or weapons, or terrorists themselves, into the United States in ocean shipping containers.

CBP has also included NVOCCs as one of the first groups of entities to be eligible to participate in the Customs-Trade Partnership Against Terrorism (C-TPAT). Again, a substantial number of NVOCCs, including Exel, have taken this opportunity to join CBP and other C-TPAT participants in a massive voluntary effort to upgrade security policies and procedures throughout the international supply chains serving the United States. Through their participation in C-TPAT, NVOCCs are being asked to continually upgrade their security arrangements and the security arrangements of their supply chain partners and to develop and adopt best practices in the area of security.

All of these security activities require money, time and management effort and attention. To the extent these factors are engaged in a wholly meaningless and sterile regulatory activity such as tariff (or “NVOCC Agreement”) filing, they cannot be devoted to these more pressing and important activities.

### **Summary and Conclusion.**

For all of these reasons, Exel respectfully submits that the proposal of the Joint Commenters should not be adopted by the Commission. Exel once again urges the Commission, as it did in its previous filing, to grant the petition of the National Customs Brokers and Forwarders Association of America (NCBFAA), which calls for the total elimination of tariff filing. This is the most sensible and efficient way to address the real problems created by the outmoded NVOCC tariff filing requirements. The Commission

has a voluminous record fully justifying the total elimination of NVOCC tariff filing and should do so as soon as possible.

Respectfully submitted,

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Date: October 5, 2004

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this 30<sup>th</sup> day of September, 2004, served a copy of the foregoing Response Of Exel Transportation Services, Inc. To Joint Supplemental Comments Requesting Expedited Adoption Of A Conditional Exemption From Tariff Publication, on the following persons listed below via first-class mail, postage pre-paid:

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